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Supreme Court, U.S.
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No. ..-...
IN THE

Supreme Court of the United States

October Term, 1988

In re TONEY CHISUM,

MORTGAGE MART, INC.,

Petitioner,

vs.

MARTIN RECHNITZER, Trustee in Bankruptcy, TONEY CHISUM, Debtor, and JULIA C. COLEMAN,

Respondents.

IN RE DOUGLAS KEN YAMADA,

Ivan Berger, DDS Pension Trust,

Petitioner,

vs.

ELSIE DAVIS, Trustee in Bankruptcy, DOUGLAS KEN YAMADA, Debtor, and LOIS WHITE,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should the filing of *four bankruptcies* in less than one year in one case, or the filing of *two overlapping bankruptcies* in two months in the companion case, in order to stop (by obtaining the automatic stay of 11 U.S.C. § 362) the *same* foreclosure sale in each case, warrant the imposition of sanctions against the debtors and their attorneys *for abuse of the Bankruptcy Code*?

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PETITION FOR WRIT OF CERTIORARI

REFERENCE TO OFFICIAL AND UNOFFICIAL OPINIONS

Memorandum opinions were filed May 26, 1988, by the United States Court of Appeals for the Ninth Circuit, in the *Mortgage Mart* matter, bearing Court of Appeals No. 87-5513, published at 847 F.2d 597, and in the *Ivan Berger* matter, bearing Court of Appeals No. 87-5988, unpublished; both are reproduced in the Appendix hereto.

STATEMENT OF JURISDICTION OF THIS COURT

The opinions of the Ninth Circuit, filed May 26, 1988, are to be reviewed. Jurisdiction is provided by 28 U.S.C. § 2101(c) and Supreme Court Rule 17.1.

Under Rule 17.1(a), this petition should be granted, since there is a conflict between the decisions herein of the Ninth Circuit and two other Circuits on the same bankruptcy abuse issues. Also, under Rule 17.1(a), in the instant cases, the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings in allowing abuse of the Bankruptcy Code, and so far sanctioned such a departure by the Bankruptcy Courts, as to call for an exercise of this Court's power of supervision to end multiple bankruptcy filings intended to obtain multiple automatic stays under 11 U.S.C. § 362.

Also under Rule 17.1(c), this is an important question of federal law which has not been, but should be, settled by this Court, to curb the enormous number of repetitive, frivolous bankruptcy filings.

THE STATUTE AND RULE WHICH THE CASES INVOLVE

Section 1927 of Title 28 of the United States Code states in pertinent part:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in a case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

This matter also involves National Bankruptcy Rule 9011(a),

which states:

> (a) Signature. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, statement of financial affairs, statement of executory contracts, Chapter 13 Statement, or amendments thereto, shall be signed by at least one attorney of record in his individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state his address and telephone number. The signature of an attorney or a party constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

National Bankruptcy Rule 9011(a).

STATEMENT OF THE CASE

Introduction

Though the *Chisum* and *Yamada* cases are unrelated factually, petitioners have joined in the petition since the legal issues are very similar. This joint petition is provided for in U.S. Supreme Court Rule 19.4.

The Chisum Case

The basis of the *Chisum* action was a Complaint for Sanctions, Punitive Damages, Attorney Fees and Abuse of the Bankruptcy Code against the debtor and his attorney, Julia Coleman. The trial court ruled in favor of the defendants. Petitioner Mortgage Mart appealed to the Bankruptcy Appellate Panel of the Ninth Circuit, which affirmed the Bankruptcy Court decision and entered an Opinion which was ordered published. *Mortgage Mart v. Rechnitzer (In re Chisum)*, 68 Bankr. 471 (Bankr. 9th Cir. 1986). The Ninth Circuit affirmed, in a published opinion in *Mortgage Mart v. Rechnitzer (In re Chisum)*, 847 F.2d 597 (9th Cir. 1988).

Statement of the Facts

The underlying bankruptcy case herein is the *fourth* that Chisum filed in less than one year in an attempt to stop the foreclosure sale by the prior lender on Chisum's property:

1. On February 22, 1983, Chisum filed a Chapter 13 petition, through defendant/respondent Julia C. Coleman, attorney, bearing Bankruptcy No. LAX 83-03120-BR. The prior lender filed an adversary proceeding and was denied all relief from the automatic stay, on the representation by debtor's attorney that all of debtor's post-petition monies due and owing had been paid to the Trustee in Bankruptcy at the debtor's confirmation hearing. In reality, a voluntary dismissal of the Chapter 13 had been filed, and was subsequently entered May 13, 1983.

2. On June 21, 1983, Chisum filed a second Chapter 13

petition, through attorney Julia C. Coleman, bearing Bankruptcy No. LAX 83-12919-RM. The prior lender received no notice of this filing. The case was dismissed August 29, 1983.

3. On December 5, 1983, two days before a scheduled foreclosure sale, Chisum filed his third Chapter 13 petition, through attorney, Julia C. Coleman, bearing Bankruptcy No. LAX 83-22675-WL. The prior lender again filed an adversary proceeding which resulted in a judgment, entered on January 27, 1984, granting immediate relief from the Section 362 stay. Said judgment was binding on the debtor for a period of six months in any further Chapter 13 petitions. Chisum thereupon dismissed his Chapter 13 on February 1, 1984.

4. Chisum's fourth Chapter 7 petition was filed in pro per on February 2, 1984, one day after the sale. The debtor's Chapter 7 court papers *signed under penalty of perjury* stated that Julia Coleman assisted in the preparation and that she was paid $100.00 for her services. At the hearing on this matter, Chisum stated under oath that Ms. Coleman was not paid and was not involved. The debtor's excuse was that he meant he paid $100.00 for a prior Chapter 13. However, debtor's last Chapter 13 papers show he had a balance owing on attorney fees of $660.00 and Ms. Coleman's excuse was that clients have been known to "white out" the date and refile documents. However, Mr. Chisum did not claim he did this. Further, Chisum's petition under perjury stated that only one prior bankruptcy petition had been filed by him, omitting two other Chapter 13 cases. The trial court did not find that these statements constituted perjury.

5. Petitioner, Mortgage Mart, purchased the property at the foreclosure sale on February 1, and was forced to file for relief from stay in the Chapter 7 proceeding in order to pursue its unlawful detainer. Petitioner, Mortgage Mart, subsequently filed a Complaint for Sanctions, Punitive Damages, Attorney Fees, and Abuse of the Bankruptcy Code against the debtor and his attorney, Julia Coleman. On June 20, 1985, the Judgment herein being appealed from was entered.

The Yamada Case

The basis of the *Yamada* action was creditor Berger's Motion on Shortened Notice for Relief from the Automatic Stay of 11 U.S.C. § 362 and Sanctions against the debtor and his attorney, Lois V. White. The trial court granted relief from the stay, but denied certification to the District Court regarding contempt and denied sanctions against the debtor and debtor's counsel. Said judgment as to sanctions was affirmed by the U.S. District Court and the Ninth Circuit Court of Appeals (see Appendix herein for unpublished opinion).

Statement of the Facts

Yamada filed his first Chapter 13 petition on February 18, 1986, bearing case number LAX 86-50795-SB. Petitioner Berger is the beneficiary of a note and deed of trust in second position on the real property of Yamada. Berger filed a motion for relief from the stay of 11 U.S.C. § 362 on April 2, 1986, which was set for hearing on April 30, 1986. However, despite Berger's oral objection at an Order to Show Cause hearing on April 7, 1986, at 11:00 a.m., an order dismissing the Chapter 13 case for failure of the debtor to prosecute (no statement or plan was filed) was entered on April 14, 1986 (an order is effective upon the date of its entry: Fed. R. Civ. P. 58).

Yamada's attorney filed the second Chapter 13 petition on April 9, 1986, *five days before* the first Chapter 13 was dismissed. Berger again filed a motion (on shortened notice) for relief from the stay of 11 U.S.C. § 362 and requested that sanctions be imposed and contempt be found against the debtor and his attorney on the grounds that the debtor filed two overlapping Chapter 13's in two months, that both petitions were filed by the same attorney, Lois V. White, and that both petitions were intended to stop the *same foreclosure* of the *same real property*. The motion for relief from stay was granted; however, the court denied sanctions, and would not certify facts regarding possible contempt to the District Court. *In re Taylor*, 59 Bankr. 197

(Bankr. M.D. La. 1986). The docket of the second Chapter 13 case shows that it was apparently dismissed at the confirmation hearing.

On August 1, 1986, Yamada, in pro per, filed his third Chapter 13 case, LAX 86-54115-SB. This Court is asked to take judicial notice of the court filing in that third bankruptcy case, which was designated as part of the record in the two appeals below. This third Chapter 13 was filed three days before a foreclosure sale was held by the lender junior to petitioner Berger herein.

FEDERAL JURISDICTIONAL STATEMENT

The basis for jurisdiction in the Bankruptcy Court is 28 U.S.C. Section 157(b). Although the underlying *Chisum* bankruptcy case was dismissed from the bench on September 3, 1985 (entered November 5, 1985), the Bankruptcy Court specifically retained jurisdiction of the matter so that it could be resolved on appeal.

The Ninth Circuit decisions appealed from in *Chisum* and *Berger* were both entered on May 26, 1988. The instant Writ of Certiorari was filed within the 90-day limit of 28 U.S.C. 2101(c).

ARGUMENT

A. This Court Must Apply The "De Novo" Standard of Review To The Issues Raised On Appeal

The applicable standard of appellate review is governed by the "de novo" doctrine. *Teichman v. Teichman (In re Teichman)*, 774 F.2d 1395 (9th Cir. 1985).

> This court reviews findings of fact by the clearly erroneous standard, Fed.R.Civ.P. 52(a), but conclusions of law are subject to do novo review. *In re American Mariner Industries, Inc.*, 734 F.2d 426, 429 (9th Cir. 1984).

Id. at 1397.

B. The Debtors And The Debtors' Attorneys Must Be Penalized For Filing And/Or Assisting In Filing Multiple Bankruptcy Proceedings

The Bankruptcy Court was asked to award substantial sanctions, attorney's fees, and punitive damages in these companion proceedings, to penalize Chisum and Yamada for filing, and their attorneys for assisting in filing, multiple bankruptcies to stop the same foreclosure sales and Mortgage Mart's unlawful detainer.

This Court should rely on the opinion of Bankruptcy Judge William A. King, Jr., in *In re Bystrek*, 17 Bankr. 894 (Bankr. E.D. Pa. 1982), which parallels the facts in these cases. Bystrek did not appear at the adversary hearing for relief from stay in his first Chapter 13, and a default judgment was entered vacating the automatic stay. On the eve of foreclosure the second Chapter 13 was filed. The court held that the second Chapter 13 filed was "a fraud upon the creditor and an affront to the integrity of the Court." *Id.* at 896. *Bystrek* was cited with approval in *In re Roderick*, 20 Bankr. 485, 488 (Bankr. D.R.I. 1982). It was also cited with approval in *In re Johnson*, 27 Bankr. 559 (E.D.N.Y 1982), *rev'd and remanded* (while affirming the *Bystrek* multiple-filing rule), 708 F.2d 865 (2nd Cir. 1983).

Also see In re Springpark Associates, 623 F.2d 1377 (9th Cir. 1980), *cert. denied*, 449 U.S. 956 (1980). Bankruptcy Judge Franklin gave a citation to this Court's case further supporting the *Bystrek* rationale: *In re Landis*, 29 Bankr. 235 (Bankr. D. Kan. 1983):

> The fact that the debtor has filed three (3) Chapter 13 cases within two years of his Chapter 7 discharge, augments the findings of a lack of good faith. Although the six year bar of successive Chapter 7 discharges in § 727(a)(8) is not applicable to Chapter 13, the Supreme Court cast a shadow on such practices in dicta in *Perry v. Commerce Loan Co.*, 383 U.S. 392, 86 S.Ct. 852, 15 L.Ed.2d 827 (1966), *reh. den.*, 384 U.S. 934, 86 S.Ct. 1441, 16 L.Ed.2d 535. There the Court stated at page 403, 86 S.Ct. at 858:
>
> > "... *Nor does our construction imply an immunity from the six-year bar to those seeking confirmation of wage-earner compositions. A composition under Chapter XIII, unlike an extension, is closely akin to straight bankruptcy and to proceedings under Chapter XI and XII, for under such a plan the debtor is discharged from his debts and claims of the creditors are only partially paid (citations omitted). It is both logical and consistent with the underlying purposes of § 14(c)(5) that confirmation of wage-earner compositions be barred by prior bankruptcy, since repeated use of such plans would, in effect, provide an opportunity for abuse of the Act.*"

Of course, Congress did not act on this dicta in writing the new Code, because § 727(a)(8) does not apply to Chapter 13. Yet, the potential abusiveness of Chapter 13 compositions within six years of a Chapter 7 discharge

> still exists. In fact, this case is a perfect example of such abusiveness.

Id. at 239-40.

Thus, it can be seen that the case law requires this Court to find that it is an abuse of the Bankruptcy Code to file more than one petition to stop the creditor from foreclosing on or evicting from the same property. *Bystrek*, at 896. *Also see In re Wong*, 30 Bankr. 87 (Bankr. C.D. Cal. 1983). In the *Chisum* and *Yamada* cases, stopping foreclosure was clearly the motive used by the debtors and their attorneys in filing four bankruptcies in one year (Chisum) and two overlapping bankruptcies in two months (Yamada).

Ms. Coleman outlined for the trial court the reasons for filing the three chapter 13's of Chisum. *There was no evidence of a true change of circumstances*, only a *possibility* of two loans. She also testified that the sole purpose of the filings was to stop the foreclosure sale.

This Court in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S.Ct. 755 (1986) stated that the normal rule of statutory construction in bankruptcy is:

> that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979). The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.

Id. at 759-60.

Another case speaking to statutory interpretation is *Phoenix Institute of Technology v. Klein (In re Klein)*, 57 Bankr. 818 (Bankr. 9th Cir. 1985). Bankruptcy Judge Elliott, quoting Justice Cardoza in *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936), states: "There is a need to keep in view also, the structure of the statute, and the relation, physical and logical, between its several parts." *Id.* at 820. In light of the

guidance of *Midlantic* and *Klein*, it is clear that, in interpreting the present Bankruptcy Code, this Court must conclude that a debtor does not have the right to continue to file petition after petition after petition as did the debtors and their attorneys in these cases. *What is clearly going on here is that bankruptcy attorneys have "discovered' that each time they sign a petition they get the benefit of a broad injunction, i.e., the automatic stay of 11 U.S.C. § 362.* One can search in vain for any legislative intent or case law that allows this type of multiple filing. *See* L. Vickman, "Adequate Protection in Bankruptcy Proceedings for the Real Property Lender -- A Review, Analysis, and Possible Synthesis of Babylonian, Athenian, Jewish, Roman, English and United States Adequate Protection Law" (1985), Leon L. Vickman, 16255 Ventura Blvd., #605, Encino, California 91436-2354. (From the time of the Babylonians to the present, there is no indication in any of the major bankruptcy systems to justify multiple filing scenarios such as we find in the instant cases.)

Returning to the *Bystrek* rationale, it is clear that the 13/13/13/7 Chisum multiple filings and Yamada's overlapping filings are worse than *Bystrek*'s 13/13 facts. In *In re Bumpass*, 28 Bankr. 597 (Bankr. S.D.N.Y. 1983), we have a 13/7(by conversion)/13 fact situation where the debtors argued they had a change in circumstances that rendered their second Chapter 13 a good faith filing. The court agreed. However, Judge Schwartzberg incorrectly relied on *In re Branch*, 10 Bankr. 227 (Bankr. E.D.N.Y. 1981), a case by Judge Parente, who later relied on the *Bystrek* opinion in the *Johnson* trial court proceeding. In *Bumpass* Judge Schwartzberg read *Branch* as requiring that, in a 7(discharged)/13 situation, the creditor had to obtain relief from the Chapter 13 stay. But note that the creditor did <u>not</u> seek or obtain relief from the Chapter 7 stay. Instead, the stay was vacated by virtue of the discharge. Also, nowhere in the *Branch* opinion did Judge Parente make a holding as claimed in *Bumpass*. Indeed, Judge Parente's later *Johnson* trial court holding is what the petitioner herein is relying on in our 13/13/13/7 situation. In fact, in *Branch*, no

issue was made regarding bad faith filing principles or abuse of the Code.

Thus, *Bumpass* and *Branch* are simply not persuasive in this 13/13/13/7 and 13/overlap/13 proceedings, and *Bystrek*'s 13/13 rule must govern, as upheld in *Johnson* by Judge Parente, the District Court *Johnson*, and the Second Circuit *Johnson*.

Most recently, several courts have followed the *Bystrek* rationale: *See Trust Deed Center, Inc. v. Bank of America National Trust and Savings Association*, 36 Bankr. 846 (Bankr. C.D. Cal. 1984); *Pasadena Thrift and Loan Association v. Bayport Equities Corp.*, 36 Bankr. 575 (Bankr. C.D. Cal. 1983), and *In re Damien*, 35 Bankr. 685 (Bankr. S.D. Fla. 1983). In addition, a number of cases have agreed with the rationale of *Bystrek*: *In re Fast Food Properties, Ltd.*, 5 Bankr. 539 (Bankr. C.D. Cal. 1980) (Chapter 11 case dismissed since obviously filed solely to stop a foreclosure sale); *Kitchens v. Georgia Railroad Bank and Trust Company (In re Kitchens)*, 702 F.2d 885 (11th Cir. 1983) (one of the nine factors to determine the debtor's good faith is the frequency with which the debtor has filed bankruptcy; *Associated Financial Services Corp. v. Cowen (In re Cowen)*, 29 Bankr. 888 (Bankr. S.D. Ohio 1983) (the "serial" filing of successive Chapter 13's may not be permitted until, at the earliest, after the granting of the discharge in the prior 7); *In re Ponteri*, 31 Bankr. 859 (Bankr. D.N.J. 1983) (filing a Chapter 13 petition within six years of a Chapter 7 discharge is evidence of bad faith); *In re Hill*, 34 Bankr. 21 (Bankr. M.D. Fla. 1983) (the purpose of the second Chapter 13 filing was solely for the purpose of frustrating the foreclosure sale); *In re Jones*, 41 Bankr. 263 (Bankr. C.D. Cal. 1984) (filing six bankruptcy petitions for the sole purpose of delaying secured creditors constituted clear abuse justifying sanctions against the debtor and his attorney); *In re Gray*, 40 Bankr. 206 (Bankr. S.D.N.Y. 1984) (a ruling in a previous Chapter 13 that the automatic stay should be vacated is *res judicata* in a later Chapter 13, citing to *Bystrek*); *Carondelet Savings and Loan Assoc. v. McKanders (In re McKanders)*, 41 Bankr. 108 (Bankr. N.D. Ga. 1984) (the stay in

a later Chapter 13 case will be terminated if the filing was only to delay the foreclosure sale); *In re Perez*, 43 Bankr. 530 (Bankr. S.D. Tex. 1984) (the court has an inherent authority to assess attorney fees against counsel who willfully abuse judicial processes by multiple filings, citing to *Bystrek*); *In re Bolton*, 43 Bankr. 48 (Bankr. E.D.N.Y. 1984) (a debtor who files a second Chapter 13 petition must show good cause why he ignored his duties to rehabilitate the prior proceeding, citing to *Johnson*); *National Home Equity Corp. v. Villareal (In re Villareal)*, 46 Bankr. 284 (Bankr. C.D. Cal. 1984) (the filing of a Chapter 7 case after filing two Chapter 13's for the sole purpose of delaying the foreclosure is an abuse of the bankruptcy process warranting sanctions against the debtor and his attorney). In *Jones*, it is interesting to note that the attorney for the debtor in this case that involved the filing of six petitions to stop one foreclosure sale was the same attorney who represented Chisum in the instant case. This Court is asked to take judicial notice of the facts in *Jones*, which are remarkably similar to the facts in the present *Chisum* case. The sequence of events was as follows: Jones I, 13; II, 7; III, 13; IV, 13; V, 13; VI, 7. Bankruptcy Judge Russell stated that "[t]he filing of Jones VI was a continuation of the abuse created by the filing of the previous five cases." *Id.* at 268. Judge Russell awarded sanctions of $500.00 each against the debtor and Ms. Coleman. *Id.* This Court is further asked to take judicial notice of *In re Kinney*, 51 Bankr. 480 (Bankr. C.D. Cal. 1985), where Bankruptcy Judge Mund likewise awarded sanctions against the same attorney, Ms. Coleman; this time, for the incredible filing of ten serial bankruptcy petitions. The facts are again familiar. The ten filings were by various family members in this order: Kinney I, 7; II, 7; III, 13; IV, 13; V, 13; VI, 13; VII, 13; VIII, 11; IX, 13; X, 13. Judge Mund levied sanctions of at least $2,500.00 against Ms. Coleman in this case, stating that should the Court discover that Ms. Coleman received more than $2,500.00 from the Kinneys for representing them, the Court "will order whether a further sum shall be paid thereafter." *Id.*

at 848. It should be painfully clear to this Court that Ms. Coleman has developed a *modus operandi* in her practice of debtor bankruptcy law in the Central District of California, based on her behavior in the *Jones* and *Kinney* matters, and now in this instant *Chisum* case. It is clear that the trial courts erred by not awarding sanctions against the *Chisum* debtor and Ms. Coleman herein, as Judge Mund and Judge Russell had done. To allow the debtor and Ms. Coleman to escape without penalty in this case simply invites continued abuse of the bankruptcy system. The same must be said for Mr. Yamada and his attorney, Ms. White, for their two *overlapping* bankruptcies.

Another opinion on point was handed down by Bankruptcy Judge John Ayer in the Central District of California in the case of *Cashman Investment Corp. v. Bradley*, 38 Bankr. 425 (Bankr. C.D. Cal. 1984). In *Bradley*, as in the instant case, the debtor had filed three Chapter 13 petitions, followed by a Chapter 7 petition, all for the specific purpose of stalling foreclosure proceedings against her home. Judge Ayer stated that, unless there has been a material change of circumstances since the previous filing, a fifth filing should not be allowed, without prior leave of the Court, for a period of six months. *Id.* at 431. The Court went on to say that "any attorney representing her in a subsequent proceeding will have to show that he did not and could not have known of the order [re no new filings for six months]; else he also may be liable for sanctions." *Id.* at 432. Bankruptcy Judges Ashland, Elliott, Lasarow, Pagter, and Phelps joined Judge Ayer in this Opinion. *Id.* at 433.

Since the *same attorney* filed the first three petitions and assisted in filing the fourth petition of Chisum, and the two overlapping cases of Yamada, they certainly had knowledge of the fact that these multiple filings were designed to keep their clients in the premises. Invoking four automatic stays in 12 months (Chisum) and two overlapping stays (Yamada) is clearly an abuse of the Code, deserving of substantial sanctions. *Id.* at 432.

The Third Circuit has spoken regarding this basic issue in

Cinema Service Corp. v. Edbee Corp., 774 F.2d 584 (3rd Cir. 1985). The *Cinema Service* court relied on National Bankruptcy Rule 9011 to award attorneys fees against Edbee's filing of a Chapter 11 petition simply to stop a sheriff's sale. *Id.* at 586. We have ample testimony in the record in the instant case that the sole motivation of Mr. Chisum and Ms. Coleman in filing the successive petitions was to stop the foreclosure sale of the secured creditor and to hinder the subsequent unlawful detainer. The Third Circuit held that the Bankruptcy Judge did not abuse his discretion of awarding sanctions by following the intent and spirit of Rule 9011. *Id.*

Even the Ninth Circuit has given us additional guidance in this matter in *Nash v. Kester (In re Nash)*, 765 F.2d 1410 (9th Cir. 1985): "A debtor's history of filings and dismissals is relevant in determining whether a plan has been proposed in good faith." *Id.* at 1415. At this point the *Nash* court made a reference to *In re Landis* (three Chapter 13 cases within two years of a Chapter 7 discharge indicates bad faith).

Thus, there is a conflict among the Circuits: *Johnson*, Second Circuit, and *Cinema Service*, Third Circuit in varying degrees hold that successive filings are an abuse of the Bankruptcy Code and warrant sanctions, while *Chisum*, Ninth Circuit, holds *contra*.

C. The Attorneys For The Debtors Signed The Pleadings In The Multiple Bankruptcy Cases in Bad Faith For The Sole Purpose Of Hindering And Delaying The Creditors' Foreclosures

Federal Rule of Civil Procedure 11 has been violated by the attorneys for the debtors.

The 1983 revision of Fed. R. Civ. P. 11 not only continued the well-grounded policy that attorneys shall not sign their name to pleadings that are interposed only for delay, but also added that the attorney's signature cannot be used for any improper purpose, such as to cause needless increase in the cost of litigation or abuse of the legal system. In addition, pleadings must be based on good cause. Advisory Committee Note of

1983, Fed. R. Civ. P. 11.

Prior case law supported these contentions: *Rhinehart v. Stouffer*, 638 F.2d 1169 (9th Cir. 1979); *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327 (9th Cir. 1981); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); *Browning Debenture Holder's Committee v. SASA Corp.*, 560 F.2d 1078 (2nd Cir. 1977); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677 (9th Cir. 1980).

The Ninth Circuit held, however, that groundless litigation for harassment or delay should be dealt with under Fed. R. Civ. P. 16, 36, or 56, rather than Fed. R. Civ. P. 11. *Chipanno v. Champion*, 702 F.2d 827 (9th Cir. 1983). Certainly, Fed. R. Civ. P. 16(a) dictates there should be no wasteful pretrial activities. Fed. R. Civ.P. 16(a)(3). Multiple bankruptcy proceedings against the same property and delaying the same creditor and its successor from realizing on the security would fall into this category under *Chipanno*. Fed. R. Civ. P. 16 applies to adversary proceedings under National Rule 7016. Fed. R. Civ. P. 36 (requests for admissions) and 56 (summary judgment) are not useful in the normal consumer bankruptcy proceeding. But Fed. R. Civ. P. 56(g) does provide for sanctions for affidavits made in bad faith or solely for the purpose of delay, in concert with *Chipanno*. (*Also see* Fed. R. Civ. P. 60(b) regarding setting aside a judgment for fraud upon the Court.)

A major decision handed down by the Ninth Circuit that discusses Fed. R. Civ. P. 11 sanctions is *Orange Production Credit Association v. Frontlines Ventures Limited*, 792 F.2d 797 (9th Cir. 1986). *Orange Production* bears directly on this case in that the Ninth Circuit stated that, when a party has litigated a matter once, he will be sanctioned if he brings the same matter again before a different court. In its analysis the Ninth Circuit stated:

> Rule 11 provides:
>
> > Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall

> be stated.... The signature of an attorney ... constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Subjective bad faith is not necessary to impose sanctions under Rule 11. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986). *Sanctions under Rule 11 are appropriate when a pleading which has been filed "is frivolous, legally unreasonable, or without factual foundation...." Id.* at 831.... OPCA knew from the California district court's decision that there is no subject matter jurisdiction in federal court over an in personam action against guarantors of a ship's mortgage. That defect had caused the district court in California to dismiss the case. And yet OPCA refiled the same case on the same claims against

the same defendants in the district court in Alaska. *Id.* at 800 (emphasis added).

In its May 6, 1985, order the district court in Alaska stated:

> ....
>
> The underlying problem as regards Rule 11 is now, and has always been, the fact that Plaintiff refiled in Alaska an action identical to that filed in California against the Individual Defendants.

Id. at 800-801.

> We further conclude that the district court did not abuse its discretion by awarding sanctions of $50,102.00 for attorneys' fees and $3,900.52 for costs.

Id. at 801. Strangely, the Ninth Circuit in the instant cases refused to extend its *Orange Production* to the bankruptcy context.

D. National Bankruptcy Rule 9011 Has Been Violated By The Attorneys For The Debtors

National Bankruptcy Rule 9011 is similar to Fed. R. Civ. P. 11 and applies to all bankruptcy proceedings filed since August 1, 1983. It is therefore applicable to the instant cases. Rule 9011 states in part that:

> The signature of an attorney for a party constitutes a certificate by him that he has read the documents; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation.... If a document is signed in violation of this rule, the court on motion

> or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

Thus, it is clear that the trial courts had authority under Fed. R. Civ. P. 11 and National Bankruptcy Rule 9011 to impose sanctions and an order to pay the reasonable expenses and reasonable attorney's fees incurred by the petitioners in these cases. The attorneys for the debtors clearly violated the rule by signing their names on all of the first three of Chisum's petitions and the first two Yamada petitions. On Chisum's fourth petition, by assisting and not signing her name, attorney Coleman was attempting to circumvent the rule so that she would not have to sign her name. She then became attorney of record. RT 4:15-24 ("MS. COLEMAN: Julia Coleman, appearing on behalf of Mr. Toney Chisum. Your Honor, I would like to point out to the court that while I did not originally represent Mr. Chisum in the filing of the chapter 7, I am here to appear on behalf of the complaint. THE COURT: So you're appearing on behalf of Mr. Chisum? MS. COLEMAN: And as to the complaint for relief from stay.") This is clearly a further abuse of the legal system, and Fed. R. Civ. P. 11 and Rule 9011 have been further violated by this transparent attempt to put the debtor "in pro per." Despite overwhelming evidence of this abuse of the Code, the trial court did not award sanctions. This Court should find that the trial courts erred, *as a matter of law*. One should note the discussion of *Cinema Service Corp.* in section A of this Argument as to the Third Circuit's concurrence with these Bankruptcy Rule 9011 cases. Also in line with our approach under Rule 9011 is a case entitled *In re Wright*, 54 Bankr. 553 (Bankr. E.D. Pa. 1985), where debtor's counsel was surcharged for fees and costs of foreclosure incurred by dismissal of one petition and immediate

filing of another.

E. Debtors' Attorneys Are Liable For Excessive Costs Under 28 U.S.C. Section 1927

We have shown that Coleman and White should be held responsible for fees and costs under Fed. R. Civ. P. 11 and Bankruptcy Rule 9011, and now present an argument under 28 U.S.C. § 1927 (see appendix for text).

The Bankruptcy Court for the Eastern District of Pennsylvania relied on Fed. R. Civ. P. 11, Rule 9011 and § 1927 in *Wright*, mentioned above, where an attorney was held liable for attorneys' fees and costs of foreclosure in the sum of $1,000.00. The court held that the attorney's "only apparent purpose" in dismissing the first Chapter 13 and filing the second was to "wipe the bankruptcy slate clean of the extant order granting the motion for relief from the stay so as to further delay the bank in foreclosing." *Id.* at 555. The court apparently found this to be unreasonable and vexatious and assessed costs and fees under § 1927, citing to *F.D. Rich Co. Inc. v. U.S. ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974). In *Rich*, Justice Marshall, delivering the opinion of this Court, stated:

> We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Id. at 129.

A recent case on point is *Estate of Blas v. Winkler (Estate of Blas)*, 792 F.2d 858 (9th Cir. 1986), where the Ninth Circuit reversed the district court's imposition of sanctions because the evidence did not show that an attorney filed a motion to reconsider in bad faith. The Ninth Circuit stated:

> Section 1927 of title 28 of the United States Code permits a federal district court to *sanction an attorney personally who "multiplies the proceedings in any case unreasonably and vexatiously."* A district court may impose sanctions under section

> 1927 only on a showing of the attorney's recklessness or bad faith.... Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument.

Id. at 860 (emphasis added).

Although the *Blas* court reversed the district court and denied sanctions, under our facts the rationale of *Blas* requires sanctions be awarded because of the 13/13/13/7 and 13/overlapping/13 fact situations and the willful filing of these cases by the debtors and the debtors' attorneys. *See Akros Installations, Inc. v. Grand National Bank (In re Akros Installations)*, 834 F.2d 1526 (9th Cir. 1987); *Eisenman v. Peoro*, 793 F.2d 1048 (9th Cir. 1986).

Chisum stated that the only purpose of the multiple filings was to prevent foreclosure, and that Attorney Coleman told him filing the instant Chapter 7 was his only recourse. RT 23:8-22. Certainly, since Ms. Coleman herself testified that she was not certain if filing a Chapter 7 was in bad faith, it was willful and reckless for her to suggest that the debtor file on his own. RT 14:8-13. Petitioner Mortgage Mart submits that behavior of Ms. Coleman multiplied the proceedings in this case, unreasonably and vexatiously under § 1927. The same arguments, as a matter of law, can be made as to Ms. White's overlapping Yamada bankruptcies.

F. Section 105 Gives The Trial Court Authority To Award Sanctions And Attorney's Fees And Costs

Under Section 105 of the Bankruptcy Code, this Court has broad powers to administer bankruptcy cases. The trial court should have utilized the power of § 105 to stop once and for all the obvious and continuing tactic of debtors' attorneys of purposely filing successive petitions as a delaying tactic on the eve of the inevitable foreclosure. There is ample rationale in the Code, as seen by the aforementioned Sections, for this Court to award the sanctions requested against both debtors and their attorneys for the flagrant abuse of the Bankruptcy Code.

Section 105(a) of the Bankruptcy Code states: "The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

COLLIER ON BANKRUPTCY, in setting forth the general provisions of Section 105(a) of the Bankruptcy Code, states that:

> The basic purpose of the section is to enable the bankruptcy court to do whatever is necessary to aid its jurisdiction, i.e., anything arising in or relating to a bankruptcy case. This might affect third parties who pose a threat to the bankruptcy case, even if there is no res involved and no state court suit pending.

Id. at 2 COLLIER ON BANKRUPTCY ¶ 105.02 (15th ed. 1985).

G. The Ninth Circuit Made Numerous Errors In Reasoning

The Ninth Circuit failed to adequately address the propriety of filing four bankruptcies and two overlapping bankruptcies to stop the *same* foreclosure sale, and also did not address the considerable case law cited herein by petitioners. The Ninth Circuit disregarded its own cases, and that of other Circuits, and instead, refused to find the bankruptcy judges erred as a *matter of law* in the undisputed facts of the multiple filings to stop the same foreclosure sales.

H. Overlapping Bankruptcies Should Not Be Allowed

The courts below disregarded or made light of the fact that Yamada's second Chapter 13 petition was filed *five days before* his first Chapter 13 was dismissed. This overlap constitutes bad faith *per se*, and is deserving of sanctions as requested by petitioner Berger. This is an *issue of law*, and therefore does not fall under the clearly erroneous standard of review.

It is axiomatic that a debtor cannot have two bankruptcies open at the same time.

> *[S]ubsequent filings merely to invoke the automatic stay without a showing of changed circumstances is*

> *an abuse of the bankruptcy process.*
> *...[M]ultiple filings which merely use the automatic stay for purposes of stalling a creditor, without any further litigative purpose, are abuses of the Bankruptcy process.*

In re Dyke, 58 Bankr. 714, 717 (Bankr. N.D. Ill. 1986) (emphasis added).

CONCLUSION

The U.S. Supreme Court is therefore asked to:

(a) declare debtors' bankruptcy cases shams, levy appropriate sanctions and fines on debtors and on their attorneys for abusing the Bankruptcy Code by making the multiple filings, and for misrepresentation to the Bankruptcy Court as to these filings;

(b) order that the debtors pay double petitioners' attorney's fees and costs for this appeal;

(c) order excessive costs and sanctions against the debtors and their attorneys for violation of 28 U.S.C. Section 1927;

(d) award costs herein, and such other additional or alternative relief as may appear to the Court to be equitable, reasonable, and just.

In view of the above items of material fact and law, the conflict in the Circuits, and other Supreme Court Rule 17.1 factors, it is respectfully requested that Petitioners be granted a Writ of Certiorari.

DATED: August 9, 1988

Respectfully submitted,
LEON L. VICKMAN
A Law Corporation,
By LEON L. VICKMAN,
Attorney for Petitioners.

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:	No 87.5988
DOUGLAS KEN YAMADA Debtor.	Dist. Co. No. CV 86-4890-FFF
IVAN BERGER, DSS PENSION TRUST, Plaintiff/Appellant, v.	Bankruptcy Court Case Number Bkcy Case No. LAX 86-51762-SB Reference No. MX6-51474-SB
ELSIE DAVIS, Trustee in Bankruptcy, and DOUGLAS KEN YAMADA, Defendants/Appellees.	M E M O R A N D U M*
and LOIS WHITE, Respondent-Appellee.	

Appeal from the United States District Court
for the Central District of California

Ferdinand F. Fernandez, District Judge, Presiding
Argued and Submitted March 9, 1988
Pasadena, California
Filed May 26, 1988

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: FARRIS, BOOCHEVER and REINHARDT, Circuit Judges

On February 18, 1986, Douglas Ken Yamada filed a Chapter 13 petition. On April 7 of that year, the petition was dismissed for failure to prosecute (no statement or plan had been filed). Yamada filed a second Chapter 13 petition two days later, on April 9.[1] Ivan Berger filed a motion for relief from the automatic stay and requested the bankruptcy court to impose sanctions and to certify the question of contempt to the district court. The bankruptcy court granted relief form the automatic stay but denied sanctions and the certification of the contempt issue. On appeal, the district court affirmed the denial of sanctions.

Berger argued that Yamada's multiple filings constitute an abuse of the bankruptcy process. The bankruptcy court disagreed. It held that the failure to present a statement and a plan with the first Chapter 13 petition was not, by itself, sufficient to show abuse of the bankruptcy process. The court described the filing of a statement and a plan with the second petition as evidence of good faith. It stated that the second filing "was made for a proper purpose, particularly in view of the fact that an escrow has been entered into for the sale of the property which is apparently scheduled to close in the near future, pursuant to which it's anticipated that the creditor, before

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[1] The order dismissing the first petition was officially filed April 7, 1986. However, it was not officially entered until April 14. Thus, in a sense, Yamada's two petitions overlapped -- a fact on which appellant puts great emphasis. The other courts which have considered this matter have not found the technical overlap to be so telling, see infra note 3 and accompanying text. Nor do we.

the Court, will be paid in full, including its attorneys fees."[2]

The district court affirmed. It noted that the "decision whether to impose sanctions for the filing of successive petitions lies within the sound discretion of the bankruptcy court, and should not be reversed unless there has been an abuse of that discretion." The court argued that deference was appropriate because "it is the bankruptcy judges themselves who observe the day-to-day abuses and are in the best position to assess the reasons and explanations given for the successive filings." Finally, the district court noted that the bankruptcy court had heard argument from both sides, carefully considered the issue, and given a detained explanation of its conclusion.[3]

The facts, procedural posture, and legal issues of this case are substantially similar to those of In re Chisum, _____ F.2d __ (9th Cir. 1988). In this case, as in Chisum, the question is whether the bankruptcy court was correct, as a matter of law, in not imposing sanctions under Bankruptcy Rule 9011. In this case, as in Chisum, this legal issue reduces to whether the bankruptcy court's finding of good faith was clearly erroneous. See Chisum, _____ F.2d at _-__ (op. at 4-6). We agree with the district court that the bankruptcy court had carefully considered Berger's claims, and that since there was adequate

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[2]Appellant asks this court to take judicial notice of the fact that the second Chapter 13 case was apparently later dismissed at the confirmation hearing and that Yamada filed a third Chapter 13 petition. Both events occurred after the decision that is currently on appeal before this court. However, because there is no per se rule making multiple filings an abuse of process, see Matter of Metz, 820 F.2d 1495, 1497 (9th Cir. 1987), and because there has been no hearing before the bankruptcy court to determine whether Yamada's subsequent actions were legally justified and in good faith, these events can have no legal relevance to the current appeal.

[3]Neither court mentioned the technical "overlap" of the two petitions, see supra note .

evidence to support its conclusions, the bankruptcy court's finding of good faith was not clearly erroneous. Therefore, the judgment of the district court is affirmed. See id at __-__ (op. at 6-7).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:	)	No 87-5513
	)	
Toney CHISUM,	)	
	)	
Debtor.	)	
	)	
	)	
MORTGAGE MART, INC.,	)	
	)	
Plaintiff/Appellant,	)	
v.	)	
	)	
Martin RECHNITZER, Trustee in Bankruptcy, Toney Chisum, Debtor, and Julia C. Coleman,	)	
	)	
Defendants/Appellees.	)	
	)	

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 9, 1988
Decided May 26, 1988

Before: FARRIS, BOOCHEVER and REINHARDT, Circuit Judges

REINHARDT, Circuit Judge:

Chisum filed a Chapter 13 petition on February 22, 1983. A voluntary dismissal was entered May 13. On July 21 of the same year, Chisum filed a second Chapter 13 petition, which was dismissed on August 29. A third Chapter 13 petition was filed on December 5 of the same year. A creditor gained relief from the automatic stay on January 27, 1984. Chisum dismissed his third petition on February 1. On the same day, Mortgage Mart

bought Chisum's home at a foreclosure sale. The next day, February 2, Chisum filed, *pro per*, a Chapter 7 petition. Mortgage Mart filed for relief from the automatic stay in order to pursue an action for unlawful detainer.

Mortgage Mart filed a complaint against Chisum and his attorney, Julia Coleman, for sanctions, punitive damages, and attorney's fees. Mortgage Mart argued that Chisum's multiple filings constituted an abuse of the bankruptcy process. It argued that the petitions were filed solely to prevent foreclosure, an objective Mortgage Mart claimed to be improper. The bankruptcy court found for the defendants on all claims. On appeal, the bankruptcy appellate panel affirmed. *In re Chisum*, 68 B.R. 471 (9th Cir. BAP 1986).

The bankruptcy court found that Chisum's petitions had been filed in good faith and that the successive petitions were justified by changed circumstances in Chisum's financial situation. The court found that the first two Chapter 13 filings had been voluntarily dismissed because of Chisum's belief that he had obtained a loan sufficient to pay off his creditors; on each occasion,however, the loan arrangements fell through. The third Chapter 13 petition was filed in good faith "in that Debtor was prevented from performing only because of a new court ruling requiring post-petition mortgage payments which Debtor could not make, even though he was prepared to make post-petition mortgage payments required as of date of filing." The court excused the fourth filing, a filing under Chapter 7, by stating that "the Court as a matter of law advises debtors who are unable to perform in Chapter 13, that Chapter 7 is available as a means of saving equity in their real property."[1] Finally, the court added

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[1]The bankruptcy court also found that there was insufficient evidence that Chisum had committed perjury in filing his Chapter 7 petition. Chisum's Chapter 7 papers stated that his lawyer Julia Coleman assisted in the preparation and that she was paid $100 for her services, even though the petition was actually *pro per*, and he listed only one of his three prior Chapter

an extended, and persuasive, quotation from a concurring opinion in *Talamini v. Allstate Ins.*, 470 U.S. 1067, 1070-72, 105 S.Ct. 1824, 1827-28, 85 L.Ed.2d 125 (1985) (Stevens, J., concurring), regarding why courts should hesitate to impose sanctions on persons filings actions or other proceedings.

The bankruptcy appellate panel affirmed. The panel first rejected the argument that the filings had been for an improper purpose: "Filing a bankruptcy petition to prevent foreclosure if undertaken pursuant to a legitimate effort at reorganization is not reprehensible and is in accord with the aim of the Bankruptcy Code." *In re Chisum*, 68 B.R. at 473. The panel also held that since there had been credible evidence of changed circumstances and of Chisum's good faith in filing multiple petitions, the bankruptcy court did not abuse its discretion in refusing to impose sanctions.

The primary legal basis for a bankruptcy court's imposition of sanctions is Bankruptcy Rule 9011(a).[2] The bankruptcy

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13 petitions. Chisum explained that Coleman's assistance and fee referred to an earlier Chapter 13 filing. As noted, the bankruptcy court held that the misstatements and omissions did not constitute perjury and were not sufficient to warrant the conclusion that Chisum intended to commit perjury. We see no reason to disturb these findings.

[2]Bankr.R. 9011(a):

Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, statement of financial affairs, statement of executory contracts, Chapter 13 Statement, or amendments thereto, shall be signed by at least one attorney of record in his individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state his address and telephone number. The signature of an attorney or a party constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact

appellate panel in this case applied an abuse of discretion standard in reviewing the bankruptcy court's decision not to impose sanctions. *Chisum*, 68 B.R. at 473. However, in a subsequent case, the bankruptcy appellate panel noted:

> The standard of review for sanction cases appears to have changed recently. In the past we have simply reviewed a trial court's decision to impose sanctions for an abuse of discretion. *See, e.g., In re Chisum*, 68 B.R. 471, 473 (9th Cir. BAP 1986). The Ninth Circuit has recently stated, however, that "[b]ecause Rule 11 mandates sanctions when it is violated, the prevailing view of the courts of appeals is that whether specific conduct violated the Rule is a legal question which must be reviewed do novo." *Golden Eagle Dist. Corp. v. Burroughs Corp.* 801 F.2d 1531, (9th Cir. 1986).

In re Lewis, 79 B.R. 893, 895 (9th Cir. BAP 1987). In a footnote, the court added:

> The cases cited here involve sanctions imposed under Rule 11 of the Federal Rules of Civil Procedure ("FRCP 11"). The language of that rule, however, and of Bankruptcy Rule 9011 are virtually identical. *Cinema Serv. Corp. v. Edbee*

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and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

> *Corp.*, 774 F.2d 584, 585 (3d Cir. 1985). Thus, courts considering sanctions under Rule 9011 have relied extensively on cases considering sanctions under FRCP 11. *See id.; In re Chisum*, 68 B.R. 471, 473 (9th Cir. BAP 1986); *In re Eighty South Lake, Inc.*, 63 B.R. 501, 506-507 (Bankr.C.D.Cal.1986).

Lewis, 79 B.R. at 895 n. 2.

The bankruptcy appellate panel in *Lewis* correctly stated the law in this circuit regarding Fed.R.Civ.P. 11 and Bankr. R. 9011: when the rule is violated, the imposition of sanctions is mandatory, not discretionary. The standard governing review of sanctions is the same under both rules.

Under Bankr.R. 9011, sanctions are required if the petitioner's actions are not "warranted by ... law." Whether a bankruptcy filing is warranted by law may depend upon factual determinations. That is the case here. Multiple Chapter 13 bankruptcy filings are legally justified "as long as each new plan is proposed in good faith." *In re Nash*, 765 F.2d 1410, 1415 (9th Cir. 1985). Good faith is a factual question. *Matter of Metz*, 820 F.2d 1495, 1497 (9th Cir. 1987)., If the bankruptcy court determines as a factual matter that a debtor's successive filings were not proposed in good faith, the court must impose sanctions under Bankr. R. 9011. However, if the court's factual finding is that the filings were proposed in good faith, sanctions are not appropriate.

On appeal, the bankruptcy court's findings regarding good faith are reviewed under a clearly erroneous standard. *Matter of Metz*, 820 F.2d at 1497. This is true even in the context of a review of a decision involving sanctions because the finding of good faith is the key factual determination underlying the bankruptcy court's refusal to impose sanctions. *See Golden Eagle*, 801 F.2d at 1538 ("If there is any dispute as to factual determinations concerning the conduct [which allegedly violated Rule 11], the determinations would be reviewed under a clearly erroneous standard.")

Though multiple filings are not *per se* illegal, *see Matter of Metz*, 820 F.2d at 1497, "[a] debtor's history of filings and dismissals is relevant in determining whether a plan has been proposed in good faith." *In re Nash*, 765 F.2d at 1415. As we noted in *Nash*:

> Under the 1978 [Bankruptcy] code, unwary creditors may suffer losses at the hands of debtors who abuse the multiple filing opportunities provided by Chapter 13. We are disturbed by the potential inequity of this result, but ... we are constrained by the express language of the Code.,

Id. at 1414.

The primary basis for the bankruptcy court's good faith determination in this case was its finding of changed circumstances. We have earlier explicitly stated that "a bona fide change in circumstances" can justify a finding that successive bankruptcy filings were proper. *Matter of Metz*, 820 F.2d at 1498. The bankruptcy judge is in the best position to assess a debtor's credibility and the legitimacy of the explanations he given for multiple filings. Here, there was sufficient evidence in the record to support the judge's conclusion that Chisum's successive filings were justified by changes in circumstances. Accordingly, the bankruptcy court's finding of good faith was not clearly erroneous.

AFFIRMED.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1988

Supreme Court, U.S.
FILED
AUG 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-307

IN THE

Supreme Court of the United States

October Term, 1988

In re TONEY CHISUM,

MORTGAGE MART, INC.,

Petitioner,

vs.

MARTIN RECHNITZER, Trustee in Bankruptcy, TONEY CHISUM, Debtor, and JULIA C. COLEMAN,

Respondents.

IN RE DOUGLAS KEN YAMADA,

IVAN BERGER, DDS PENSION TRUST,

Petitioner,

vs.

ELSIE DAVIS, Trustee in Bankruptcy, DOUGLAS KEN YAMADA, Debtor, and LOIS WHITE,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:	)	BAP No. CC-85-1118-MeMoV
Toney CHISUM,	)	
Debtor.	)	
	)	
MORTGAGE MART, INC.,	)	OPINION
Plaintiff/Appellant,	)	
v.	)	
Martin RECHNITZER, Trustee in Bankruptcy, Toney Chisum, Debtor, and Julia C. Coleman,	)	
Defendants/Appellees.	)	

Argued and Submitted
October 29, 1986 - Pasadena, California
Filed: December 23, 1986

Appeal from the United States Bankruptcy Court
for the Central District of California
Hon. James R. Dooley, Bankruptcy Judge, Presiding

Before: MEYERS, MOOREMAN AND VOLINN
Bankruptcy Judges

MEYERS, Bankruptcy Judge:

I

A creditor, Mortgage Mart, Inc. ("Creditor"), brought this suit against the Debtor, Toney Chisum, and his attorney, Julia Coleman, claiming that their repeated bankruptcy filings required the Bankruptcy Court to award sanctions, punitive damages and attorney's fees in favor of the Creditor. The Bankruptcy Court ruled in favor of the defendants and the Creditor now appeals.

We AFFIRM.

II

FACTS

On February 22, 1983, the Debtor, through his attorney Coleman, filed his first bankruptcy petition under Chapter 13 of the Bankruptcy Code ("Code"). The Debtor timely filed a Statement, a Plan and made scheduled payments to all secured creditors during the course of this proceeding. The Debtor also attempted to negotiate a loan to pay off his obligations to the Creditor. Under the belief that he had secured such a loan, the Debtor voluntarily dismissed the case. He subsequently learned, however, that the loan would not be granted because he had filed a Chapter 13 petition.

The Debtor then filed his second Chapter 13 petition on June 1, 1983. After finding another lender who assured disbursal of the funds upon the dismissal of the case, the Debtor again allowed the Chapter 13 proceeding to be dismissed. The loan was not funded.

On December 12, 1983, the Debtor filed his third Chapter 13 petition. Because this was the third bankruptcy filing, the Court required the Debtor to make postpetition mortgage payments owed from the date of

the first Chapter 13 petition or the last six months, whichever was less. Since the Debtor was unable to make such payments, the Court lifted the stay and ordered that this relief would be effective against the Debtor in any future Chapter 13 proceedings over the next six months.

After consulting with Coleman the Debtor dismissed his Chapter 13 case on February 1, 1983, with the intent to commence a Chapter 7 proceeding. The Creditor, however, foreclosed and purchased the property that same day. The Debtor subsequently did file his Chapter 7 petition. Although this was too late to protect his home against foreclosure, it did force the Creditor to bring another complaint to lift the stay so that it could pursue an unlawful detainer action.

The Creditor commenced this case with a complaint alleging that the multiple bankruptcy filings were in bad faith and abused the Bankruptcy Code, thus justifying sanctions, punitive damages and attorney's fees. At the trial, the Debtor admitted that one purpose of his bankruptcy filings was to protect his home from foreclosure. Coleman testified that after the Court lifted the stay in the third Chapter 13 case, she advised the Debtor that his only recourse to protect his house was to file a Chapter 7 petition. Coleman, however, refused to file this petition herself because of her own doubts over the propriety of the action.

The Debtor's Chapter 7 papers stated that Julia Coleman did assist in the preparation of the petition and that she was paid $100 for her services. The petition also stated that only one prior bankruptcy petition had been filed. However, the Debtor testified at trial that he meant that Coleman had helped prepare past petitions and had been paid $100 for that help. He explained that he used a previous Chapter 7 petition prepared by Coleman on behalf of a Betty Autrey as a guide for his own filing. Betty Autrey testified that she actually filed

the Chapter 7 petition on the Debtor's behalf.

The Bankruptcy Court concluded that the three Chapter 13 petitions were filed in good faith and were not an abuse of the Code because there were changed circumstances to warrant the actions. With respect to the Chapter 7 filing, the Court stated,

> That the Court as a matter of law advised debtors who are unable to perform in Chapter 13, that Chapter 7 is available as a means of saving equity in their real property.

The Court then concluded that there was no abuse of the Code by the filing of the Chapter 7 petition. Finally, the Court found insufficient evidence for perjury.

III

DISCUSSION

The Bankruptcy Court has the inherent power to impose sanctions on parties and counsel who wilfully abuse the judicial process. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *In re Jones*, 41 B.R. 263, 267 (C.Cal. 1984). The power to correct abusive practices is found in Section 105(a) of the Code which states:

> The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

11 U.S.C. § 105(a). In addition, a bankruptcy court may render sanctions against a party or an attorney under the authority of Bankruptcy Rule 9011 or 28 U.S.C. § 1927. *Cinema Service Corp. v. Edbee Corp.*, 774 F.2d 584, 585-86 (3d Cir. 1985); *In re Jones*, *supra*, 41 B.R. at 267. Bankruptcy Rule 9011 states in relevant part:

> The signature of an attorney or a party constitutes a certificate by him that he

> has read the document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation .... If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

Bankruptcy Rule 9011. *See also* Fed. R. Civ. P. 11.

Section 1927 of title 28 states in relevant part:

> Any attorney ... who so multiplies the proceedings in a case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorney's fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

The Creditor claims on appeal that the Court erred in not awarding sanctions because the Debtor's only purpose in filing three Chapter 13 petitions and a Chapter 7 petition was to prevent a foreclosure on his property. According to the Creditor, this constitutes bad faith and an abuse of the Code thus requiring the imposition of sanctions. *See In re Jones, supra*, 41 B.R. at 268; *In re Bystrek*, 17 B.R. 894, 895-96 (E.Pa. 1982).

A court's decision to impose or not to impose sanctions will not be reversed absent an abuse of

discretion. *See Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 764; *Cinema Service Corp. v. Edbee Corp., supra,* 774 F.2d at 586. Filing a bankruptcy petition to prevent foreclosure if undertaken pursuant to a legitimate effort at reorganization is not reprehensible and is in accord with the aim of the Bankruptcy Code. *Cinema Service Corp. v. Edbee Corp., supra,* 774 F.2d at 586. Debtors may file successive Chapter 13 plans as long as each new plan is proposed in good faith. *In re Nash*, 765 F.2d 1410, 1415 (9th Cir. 1985).

In the present case, we find no abuse of discretion in the Bankruptcy Court's decision not to impose sanctions against the Debtor or his attorney. Although the Debtor admitted that one purpose of the filings was to avoid foreclosure on his home, he also indicated, as did Coleman, that the dismissals resulted from a good faith belief that circumstances had changed. The Bankruptcy Court believed the Debtor and Coleman's testimony that twice after complying with the lender's requirement to have the bankruptcy case dismissed, the loan fell through. Faced with no funds from the lender and no protection from foreclosure, the Debtor refiled. Since the Court found that the filings were not solely intended to hinder or delay creditors and that there is no bad faith or abuse of the Code, then there is no abuse of discretion in refusing to award sanctions.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:	CV 86-4890
DOUGLAS KEN YAMADA, Debtor.	Bk. No. LAX 86-51762 SB
	Ref. No. MX6-51474 SB
IVAN BERGER DDS PENSION TRUST, Appellant,	O P I N I O N A F F I R M I N G
v.	O R D E R D E N Y I N G
ELSIE DAVIS, Trustee in Bankruptcy, and DOUGLAS KEN YAMADA, Appellees.	SANCTIONS

This matter came on for hearing on March 23, 1987, on an appeal of the bankruptcy court's Order denying a motion for sanctions against the debtor and his attorney, Lois V. White. Leon L. Vickman appeared on behalf of the appellant. Michael A. Cisneros appeared on behalf of appellee Lois White.

Appellant submits that the bankruptcy court erred in not granting sanctions against the debtor and his counsel for their filing of two Chapter 13 petitions within a two month period.

Upon consideration of the briefs, excerpt of record, and argument of the parties, the Court concludes that the Order of the bankruptcy court should be affirmed.[1]

Debtors may file successive Chapter 13 petitions as long as each new plan is proposed in good faith. *In re Nash*, 765 F.2d 1410, 1415 (9th Cir. 1985). The decision whether to impose sanctions for the filing of successive petitions lies within the sound discretion of the bankruptcy court, and should not be reversed unless there has been an abuse of that discretion. *In re Chisum*, 68 B.R. 471, 473 (9th Cir. BAP 1986).

Here, the Court finds that bankruptcy judge Bufford did not abuse his discretion in declining to impose sanctions against either Mr. Yamada or Ms. White. This Court is well aware of the difficulty caused by the filing of successive and abusive bankruptcy petitions. Nevertheless, it is the bankruptcy judges themselves who observe the day-to-day abuses and are in the best position to assess the reasons and explanations given for the successive filings. This does not mean, of course, that the bankruptcy judges cannot err.

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[1] On April 3, 1987, or ten days after the hearing, counsel for appellee White filed a Motion to Dismiss Appeal for Mootness, on the grounds that Ms. White passed away while the appeal was pending. No authority, however, is cited for such a finding other than the bankruptcy rule dealing with voluntary dismissal. Bankruptcy Rule 8001(c)(2). The Court fails to see the applicability of that section, and declines to hold that this appeal is moot.

In this case, however, it is apparent that Judge Bufford did not abuse his discretion. The record reflects that he heard argument from both sides and carefully considered the sanctions issue. He then gave a detailed explanation in support of his conclusion that appellees had not acted in bad faith. (May 28, 1986 Transcript of Proceedings at 21-23).

In sum, Judge Bufford recognized that not every multiple filing demonstrates an ipso facto act of bad faith. He was correct in both principle and in practice. The Order denying sanctions is hereby **AFFIRMED**.

DATED: May 20, 1987

FERDINAND F. FERNANDEZ
United States District Court

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1988